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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1382~~ 70-79

RELIANCE ELECTRIC COMPANY,
Petitioner,

v.

EMERSON ELECTRIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Eighth Circuit.

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In the Supreme Court of the United States

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No. _____.

RELIANCE ELECTRIC COMPANY,

Petitioner,

v.

EMERSON ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Eighth Circuit.

Reliance Electric Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above cause on November 12, 1970.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at CCH Fed. Sec. L. Rep. ¶ 92,863, and not yet reported in the Federal Reporter, is reprinted in Appendix A. The judgment of the Eighth Circuit, filed on November 12, 1970, is reprinted in Appendix B. The Memorandum Opinion of the United States District Court for the Eastern District of Missouri, filed on September 18, 1969, and reported at 306 F. Supp. 588, is reprinted in Appendix C. The Interlocutory Declaratory Judgment of the District Court, filed on October 9, 1969, is reprinted in Appendix D.

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 12, 1970. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

May the beneficial owner of more than 10% of an issuer's stock, desiring to sell all of its stock of the issuer at a profit within six months of the purchase of such stock, insulate from Section 16(b) of the Securities Exchange Act of 1934 and retain for its own benefit the short-term profits on 9.96% of such stock by effecting its single predetermined plan of disposition through the technique of two sales, the first of which reduces the beneficial owner's holdings to 9.96%, and the second of which disposes of the balance?

STATUTE INVOLVED.

The relevant portions of the text of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), are as follows:

> Section 16(b). For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner [the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 of this title],[1] director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

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[1] The bracketed words are taken from Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(a).

STATEMENT OF THE CASE.

On June 16, 1967, pursuant to a tender offer for shares of Dodge Manufacturing Company ("Dodge"), Emerson Electric Company ("Emerson") purchased 152,282 shares of Dodge stock at $63 per share. These shares constituted 13.2% of the then outstanding Dodge common stock. On August 28, 1967, Emerson sold 37,000 shares of Dodge stock on the New York Stock Exchange at $68 a share, reducing its holdings to 9.96% of the then outstanding Dodge common stock. On the following day, August 29, 1967, Emerson entered into negotiations with Dodge, and on September 13, 1967, Emerson sold the remaining 115,282 shares to Dodge at $69 per share. On September 29, 1967, Dodge merged into Reliance Electric Company ("Reliance"), petitioner herein.

On February 29, 1968, Emerson filed a petition for declaratory judgment in the United States District Court for the Eastern District of Missouri (the "District Court"), asking that the court determine and declare the liability, if any, of Emerson to Reliance for the amounts of the profits realized by Emerson from the two sales of Dodge stock described above. Jurisdiction of the District Court was based on Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa), and upon diversity of citizenship and amount. In trial on the issue of liability alone, the District Court determined that Emerson is liable to Reliance for the net profits realized by it from the sales of all 152,282 shares of stock of Dodge, for the reasons set forth in its Memorandum Opinion filed September 18, 1969, Appendix C hereto.

The United States Court of Appeals for the Eighth Circuit (the "Eighth Circuit") granted Emerson's petition for leave to take interlocutory appeal under 28

U.S.C. § 1292(b). The Eighth Circuit accepted the findings of the District Court set forth below, but held that as a matter of law Section 16(b) does not apply to Emerson's profits on the second sale.

The relevant undisturbed findings of the District Court were (1) "Emerson's initial sale of 37,000 shares was motivated *solely* by its desire to reduce its holding to just under 10% immediately prior to disposing of the balance of its shares in an attempt to escape Section 16(b) liability on the short-swing profits it contemplated would be made on such remaining shares"; (2) ". . . that although the two sales of Dodge stock were technically separate transactions and the second sale was not 'legally' tied in any way to the first sale, the two sales were effected pursuant to a single pre-determined plan of disposition with the overall intent and purpose of avoiding Section 16(b) liability"; and (3) that ". . . the obvious substance of the transaction as to a whole is the disposition of its [Emerson's] more than 10% beneficial interest."[2]

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[2] Emphasis added throughout.

REASONS FOR GRANTING THE WRIT.

Prior to the decision of the Eighth Circuit in the instant case, no federal court had ever approved a technique by which a statutory insider could so shape his transactions in his issuer's shares as to insulate from Section 16(b) a substantial portion of profits realized by him from stock purchases and sales within a six-month period. Now, for the first time in the history of decisions under Section 16(b), short-term profits may be made, and kept, by an insider who follows what the District Court called the "two-step sale procedure" used by Emerson and approved by the Eighth Circuit.

It can be expected that the two-step sale technique will become the "standard operating procedure" in every short-term disposition of stock by a 10% beneficial owner, to the detriment of the investing public which Section 16(b) was designed to protect, unless this Court agrees to review the decision below. For corporate insiders with informed counsel using this technique, the Eighth Circuit will have in effect amended Section 16(b) so as to strike the words "any profit" and insert the words "that portion of profits which exceeds the profits realized on sale of 9.9% of the issuer's stock."

The recent increase in corporate takeover bids by tender offer has greatly magnified the opportunities for 10% beneficial owners to take short-term profits. Indeed, it is widely understood in the national financial community that a company which makes a takeover bid by tender offer can usually make short-term profits on the stock so acquired if its merger proposal is rejected. As the Wall Street Journal reported (January 27, 1969, at 1, col. 6):

> A company can hardly lose by making a merger proposal these days. If its proposal is accepted, it

gets an acquisition. If its proposal is spurned, it usually makes money in the stock market.

For a company proposing a merger nowadays usually will first buy some stock in its intended partner. Announcement of its proposal usually pushes up the price of that stock—and the price tends to stay up even if the merger falls through, allowing the rejected company to sell out at a profit. The profit can be particularly big if, as often happens, the rejected company loses out to another concern that makes a better offer; the price of stock in a company wooed by several would-be merger partners usually rises with each successive bid.

This sequence has occurred often enough to produce some of the happiest rejected suitors ever seen.

Until recently, Section 16(b) has protected the investing public against the more flagrant cases of short-term profit-taking arising out of tender offers. Now the Eighth Circuit has removed this protection and has created a loophole through which very substantial short-swing profits will in the future be made. Thus, for example, in the very recent decision of *Abrams v. Occidental Petroleum Corp.*, CCH Fed. Sec. L. Rep. ¶ 92,875 (S.D.N.Y. Nov. 27, 1970), Occidental Petroleum was held liable under Section 16(b) for about $17,700,000 of short-term profits in the purchase and sale of shares of Kern County Land Company. If Occidental had followed the technique used by Emerson, and had entered into two option agreements with different optionees on different days, pursuant to a plan, Occidental would have insulated from recovery, by means which the Eighth Circuit now permits, more than $8,600,000 of its short-term profits in Kern County Land Company stock.

The rule of the Eighth Circuit has wider application than simply to the tender offer situation. The two-step

sale procedure can be used by any 10% beneficial owner to make and keep short-term profits free from the reach of Section 16(b).[3] Thus, for example, if Jones, the owner of 15% of the stock of X Corporation, learns by virtue of his position as an insider that at a directors' meeting two weeks hence the quarterly dividend will be reduced, Jones can thereupon, pursuant to a plan, sell 5.1% of his stock, wait a week, and then sell the remaining 9.9%. After the directors have met and lowered the dividend, and the market has responded to the news, Jones can repurchase his 15%. Under the general rule set forth by the Eighth Circuit in the decision below, Jones will pay just over one-third of his short-term profits, the profit on the sale and repurchase of 5.1% of the stock, to X Corporation, and will pocket his short-term profits on the remaining 9.9%.

In the first case to arise in the federal courts construing Section 16(b), *Smolowe v. Delendo Corp.*, 136 F.2d 231, 239 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943), the Second Circuit Court of Appeals determined that:

> . . . [T]he statute was intended to be *thoroughgoing*, to squeeze *all possible profits* out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of his duty.

In 28 years of judicial construction of Section 16(b), the federal courts have uniformly applied this standard. As the Second Circuit Court of Appeals stated in *Blau v.*

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[3] The fact that there may be a cause of action against an insider using the two-step sale procedure under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder does not provide an adequate substitute for a deficiency in Section 16(b), for the plaintiff in a Rule 10b-5 suit has the burden of showing actual abuse of inside information. Section 16(b), with its automatic "rule-of-thumb" operation, was enacted precisely to eliminate this often very difficult burden of proof.

Lamb, 363 F.2d 507, 516 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967):

> . . . [T]he theory of regulation underlying Section 16(b) requires the application of this section to every transaction that *might possibly permit* an insider to use inside information unfairly . . . .

A decision which permits an insider, in the words of the Eighth Circuit, to "intentionally minimize or eliminate his loss of profits under Section 16(b)" simply by his own careful arrangement of the *form* of his transactions, and thus to retain cash profits on sales of stock held less than three months, is clearly in conflict with the standards of fiduciary conduct heretofore applied by federal courts construing Section 16(b).

The recent decision of *Bershad v. McDonough*, 428 F.2d 693 (7th Cir. 1970), *cert. denied*, No. 791, October 1970 Term, 39 U.S.L. Week 2397 (1971), is the closest prior decision to the decision below. There the two-step sale procedure designed to avoid Section 16(b) liability consisted of an "option" agreement entered into within the six month period, and exercise of the option immediately after the six month period had passed. The Seventh Circuit, holding that what was an option agreement as a matter of contract law constituted a "sale" under Section 16(b), stated the applicable rule as follows (428 F.2d at 697):

> The phrase "any purchase and sale" in Section 16(b) is therefore *not* to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties. . . . The insider should *not* be permitted to speculate with impunity merely by varying the paper form of his transactions.

In contrast, the Eighth Circuit in the instant case based its decision that Section 16(b) did not apply to Emerson's

second sale squarely upon the commercial and contractual characteristics of Emerson's transactions. The Eighth Circuit predicated its holding on the finding of the District Court that Emerson's two sales were "not legally tied together in any way," although this finding clearly meant only that the two sales were not tied together as a matter of contract law or commercial law (for the District Court did find the sales inseparably linked under federal securities law). The rule applied below is therefore in direct conflict with the rule applied in *Bershad v. McDonough*.

In the 36 years since its enactment, Section 16(b) has been a cordially disliked but impressively effective piece of legislation. A large part of the great success of Section 16(b) in elevating standards of insider conduct has been due to the well-founded belief of corporate insiders that no "technique" or method of framing their transactions will permit them to retain profits on sales of shares acquired within six months. The decision below establishes for the first time a significant exception to this rule, because it does approve a technique whereby an insider can readily take short-term insider profits at will. The effectiveness of Section 16(b) as a standard of conduct for corporate insiders will be materially impaired if this Court permits the technique for taking short-term profits approved by the Eighth Circuit Court of Appeals to stand unreviewed.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No: 20,014

EMERSON ELECTRIC CO., a Missouri Corporation,
Appellant,

vs.

RELIANCE ELECTRIC COMPANY, an Ohio Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

[November 12, 1970.]

Before GIBSON and LAY, Circuit Judges and HUNTER, District Judge.

HUNTER, District Judge.

This is an interlocutory appeal from a declaratory judgment holding that Emerson Electric Company is liable to Reliance Electric Company under Section 16(b) of the Security Exchange Act of 1934[1] for the net profits realized by Emerson from the sale on August 28, 1967, of 37,000 shares of the stock of Dodge Manufacturing Corporation and from the sale on September 13, 1967, of 115,282 shares

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[1] 48 Stat. 896 (1934); 15 U.S.C. § 78(P).

of Dodge stock.[2] Only the issue concerning the amount of profits recoverable by Reliance has been reserved for future determination by the District Court.

The salient facts are relatively undisputed.[3] Toward the end of 1966, Emerson, a St. Louis based manufacturer of electric motors, became interested in Dodge of Mishawaka, Indiana, a company engaged in the manufacture of transmission equipment and other devices used with electric motors. Dodge was a publicly held corporation, and its stock was listed on the New York Stock Exchange. Emerson engaged in merger negotiations with Dodge. On March 12, 1967, Emerson was advised that Dodge's board had rejected Emerson's merger offer. On March 22, 1967, Emerson withdrew its merger proposal, terminated negotiations with Dodge, and so advised the financial community.

On May 22, 1967, Emerson invited tenders of up to 550,000 shares of Dodge's common stock at a price of $63 per share, the tender offer to expire June 16, 1967. At that time Emerson elected to purchase all of the 152,282 tendered shares. These shares constituted 13.2 percent of the outstanding Dodge stock. Prior to June 16, 1967, Emerson had not owned any shares of Dodge stock.

Shortly before the Dodge stock acquisition by Emerson, Dodge and Reliance Electric & Engineering Company (now Reliance Electric Company) had entered into an agreement whereby Dodge was to be merged into Reliance.[4] Emerson sought to prevent the merger, which

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[2] The District Court certified the case for interlocutory appeal under authority of 28 U.S.C. § 1292(b) with leave granted by this Court to take the interlocutory appeal.

[3] The parties stipulated to most of the essential facts prior to the trial, and the District Court has set them out in its opinion reported at 306 F.Supp. 588.

[4] The evidence indicates Dodge's management unexpectedly announced its intent to merge with Reliance.

needed stockholder approval, advocating instead a merger with Emerson.[5]

A stockholders' meeting to consider the merger proposal was called for August 22, 1967. A proxy fight ensued, the result of which was a victory for Reliance.[6] Shortly thereafter, but prior to the final approval of the Dodge-Reliance merger by the Dodge directors, Emerson sold its Dodge holdings. Emerson first sold 37,000 shares at $68 a share on August 28, 1967, to Goldman, Sachs & Company, investment brokers. This sale reduced Emerson's holdings to 9.96 percent of the then outstanding shares of Dodge. Then, on September 11, 1967, it sold the remaining 115,282 shares at $69 a share to Dodge.

The background of the two sales is that Emerson had been advised by its counsel by letter that Section 16(b) might apply if Emerson owned 10 percent or more of Reliance's stock at the time of a Reliance and Dodge merger; counsel further advised that Emerson reduce its holdings below 10 percent, and they advised that from that point on, Emerson, no longer being a 10 percent stockholder of Dodge, could sell the balance of its Dodge stock free of any 16(b) risk, "provided, of course, the second sale is not legally tied in any way to the first sale."[7]

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[5] On May 27, 1967, Dodge filed suit in federal court in South Bend to enjoin Emerson from accepting any tenders and from further pursuing its tender offer. The District Court denied the injunction, finding in its memorandum opinion that Emerson did not have any "insider" information about Dodge and that all its knowledge about Dodge had been obtained from publicly available sources.

[6] Emerson made a counter-proposal in opposition to Reliance's merger offer and the Dodge board opposed it and refused to allow Emerson to examine the list of Dodge's shareholders. Emerson successfully filed suit to obtain the list.

[7] See, Lang & Katz, Liability for "Short Swing" Trading in Corporate Reorganizations, 20 Sw. L.J. 472, 486-87 (1966); Roger

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Emerson sold the mentioned 37,000 shares, reducing its holdings to 9.9 percent of Dodge stock. On August 29, 1967, counsel for Reliance initiated discussions with counsel for Emerson to purchase the remaining 115,282 shares of common stock of Dodge from Emerson. Prior to this time Emerson had not offered to sell the 115,282 shares of Dodge to Reliance.

Based essentially on these facts, the District Court found that Emerson's two sales transactions were related parts of a single plan devised by Emerson to dispose of all of its Dodge stock in an attempt to avoid the consequences of Section 16(b), and held Reliance was entitled to the profits from both sales.[8] This appeal followed.

(Continued from preceding page)

George, The Application of Section 16(b) to Mergers: A Hidden Hazard, 47 Tex. L. Rev. 1417 (1969).

The letter written ten days after Emerson had purchased its Dodge shares advised that in view of the uncertainty as to whether Emerson's purchases would be subject to Section 16(b) Emerson should seek to avoid 16(b) consequences by reducing its holdings to less than 10 percent by means of gift or sale prior to August 22, 1967, of 37,150 shares of Dodge stock; "[that] from this point on, Emerson, no longer being a 10 percent stock owner of Dodge, can sell the balance of its Dodge stock free of any 16(b) risk; provided, of course, the second sale is not legally tied in any way to the first sale." * * * "It may be possible at sometime before the Dodge-Reliance merger vote to agree upon a settlement with these companies under a negotiated agreement providing for the purchase of the Dodge shares owned by Emerson and/or the Reliance preferred shares to be received if the Dodge-Reliance merger is effected. It seems necessary however, that any such settlement provide for a sale by Emerson of at least 37,100 of its Dodge shares before the August 22, meeting date."

[8] For the full reasoning of the District Court, see 306 F.Supp. 588, 591-593 (E.D. Mo. 1969), wherein it is stated, loc. cit. 592: ". . . although the two sales of Dodge stock were technically separate transactions and the second sale was not "legally" tied in any way to the first sale, the two sales were effected pursuant to a single pre-determined plan of disposition with the overall intent and purpose of avoiding Section 16(b) liability. Emerson's initial sale of 37,000 shares was motivated solely by its desire to

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Section 16(b) of the Securities Exchange Act

Section 16(b) reads:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer, in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. * * * *This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved,* or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." (Italics added.)

Thus, under the provisions of Section 16(b) owners owning more than 10 percent or more of the security of

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reduce its holdings to just under 10% immediately prior to disposing of the balance of its shares in an attempt to escape Section 16(b) liability on the short-swing profits it contemplated would be made upon such remaining shares."

* * *

"Looking through form to discern substance, we hold that in truth and in fact the two sale transactions were related parts of a single plan devised by Emerson to dispose of all its Dodge stock in an attempt to 'avoid the consequences' of Section 16(b). . . . [W]e believe that for purposes of this case the 'time of sale' should include the entire period during which a series of related transactions take place pursuant to a plan by which a 10% beneficial owner disposes of his stock holdings."

a company "*both at the time of the purchase and sale,* or the sale and purchase of the security involved" are accountable to the corporation for any profit realized on the security transactions made within a six month period.[9]

The initial question presented on this appeal is whether Emerson's purchase of 13.2 percent of the outstanding shares of Dodge's common stock, when prior to such purchase Emerson had not owned any Dodge securities, made Emerson at the time of that very purchase a more than 10 percentum beneficial owner within the meaning of Section 16(b).

It is Emerson's position that the exemption provision of Section 16(b) applicable to more than 10 percent beneficial owners specifically exempts any transaction where such beneficial owner was not such *both at the time of purchase and sale,* and that "at the time of" means "prior to" the purchase in question. However, Reliance contends that "at the time of" means "simultaneously with" the purchase in question. Both parties cite an array of text and Law Review commentaries which reflect there exists no unanimity on the part of legal scholars on the question presented.[10]

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[9] Section 16(a) reads: "Every person who is directly or indirectly the beneficial owner of *more than 10 per centum* of any class of any equity security (other than an exempted security) which is registered on a national securities exchange." (Italics added.)

[10] For some examples, see: W. Painter, Federal Regulation of Insider Trading, Chpt. III, pp. 24-52 (1968); Note, Short-Swing Profits and the Ten Percent Rule, 9 Stan. L. Rev. 582 (1957); Note, Stockholder Acquiring 10% Ownership on Purchase Held Liable for Profits Under Section 16(b) of the Securities Exchange Act, 57 Colum. L. Rev. 287 (1957); Note, Director Held Liable Under Section 16(b) for Short Swing Profits on Stock Purchased Prior to His Becoming a Director, 45 Va. L. Rev. 1057 (1959); Note, Purchase of Stock By Which Stockholder Becomes a 10% Beneficial Owner is Covered by § 16(b), 70 Harv.

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There is reasonable unanimity as to the *broad* purpose sought to be served by the enactment of Section 16(b). In one of the Congressional Committee Reports on the pending legislative act concerning the subject of the evils of certain "short-swing trading" it was declared that a purpose of 16(b) was "to protect the interests of the public against the predatory operations of directors, officers, and principal stockholders of corporations by preventing them from speculating in the stock of the corporations to which they owed a fiduciary duty." [11] While not unanimous, the majority of the text and law review writers, as well as the majority of the case decisions, appear to concede that the 16(b) statutory language "both at the time of purchase and sale" is not clear and has an element of ambiguity. As one writer expressed it, "at the time" is not a phrase of precise meaning. It may refer to a condition existing either "immediately before", "simultaneously with" or "immediately after" a given event. It is doubtful that Congress intended it to have one of those meanings in every situation. Therefore, without departing from the statute the words "at the time" might mean "immediately before" in the case of a purchase and "simultaneously with" in the case of a repurchase.[12]

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L. Rev. 1312 (1957); Seligman, Problems Under the Securities Exchange Act, 21 Va. L. Rev. 1 (1934); Lowenfels, Section 16(b): A New Trend In Regulating Insider Trading, 54 Corn. L. Q. 45 (1968); Munter, Section 16(b) of The Securities Exchange Act of 1934; An Alternative to "Burning Down The Barn In Order to Kill the Rats", 52 Corn. L. Q. 69 (1966); Note, Insider Trading: The Issuer's Disposition of An Alleged 16(b) Violation, 1968 Duke L. Rev. 94; George, The Application of Section 16(b) To Mergers: A Hidden Hazard, 47 Texas L. Rev. 1417 (1969).

[11] S. Rep. No. 1455, 73d Cong., 2d Sess. 68 (1934). See also: 48 Stat. 881 (1934); 15 U.S.C. § 78.

[12] Note, Stockholder Acquiring 10% Ownership on Purchase Held Liable for Profits Under Section 16(b) of the Securities Exchange Act, 57 Colum. L. Rev. 287, 289 (1957).

Prior Decisions

In spite of the intense interest in the question, there is a paucity of judicial decision on the precise question presented on this appeal. It was the case of *Stella v. Graham-Paige Motors Corp.*, 232 F.2d 299 (2nd Cir. 1956), cert. den. 352 U.S. 831 (1956) affirming 104 F. Supp. 957 (S.D. N.Y. 1952) that provided the notable decision in the still continuing battle concerning proper interpretation of the Section 16(b) words "at the time of". The Second Circuit, in a two-to-one opinion rejected the defendant's contention that the proviso required the exclusion of a person who was not a 10 percent owner before each of the transactions involved. Instead, the Court based its decision on the interpretation of the proviso adopted by the district court and supported by the SEC in an amicus brief, that a 10 percent stockholder need only be such simultaneously with each transaction; that is, just after a purchase or just before a sale.[13]

Courts having the occasion to interpret the Securities Act with regard to questions other than the precise one we have before us have generally held that the Act should be liberally construed to carry out the express legislative policy.[14]

While the problem of interpretation is difficult and not free of all doubt, we are persuaded that in the case

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[13] To the contrary, see, *Arkansas Louisiana Gas Co. v. W. R. Stephens Investment Co.*, 141 F.Supp. 841 (W.D. Ark. 1956).

[14] See *Cresswell-Keith, Inc. v. Willingham*, 264 F.2d 76, 80 (8th Cir. 1959). See, *Western Auto Supply Co. v. Gamble-Skogmo, Inc.*, 348 F.2d 736, 743 (8th Cir. 1965), where we stated, "The Supreme Court in *Blau v. Lehman*, 368 U.S. 403, 414, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962), speaks of the 'prophylactic' effect Congress clearly prescribed in § 16(b). Other cases cited in this opinion refer to § 16(b) as being 'remedial', 'broadly remedial', 'thorough-going', and 'absolute' and strictly construing the statute against the insider in order to effectuate its wholesome purpose."

before us the District Court reached the right result in its holding that the purchase by which one becomes a more than 10 percentum stockholder, where followed by a sale within six months of some or all of the purchased security makes the purchaser a more than 10 percentum beneficial owner within the meaning of Section 16(b) "both at the time of the purchase and sale." We endeavor to give our reasons for reaching this result.

We are persuaded that the Congressional intent, albeit broad and not as clear as desirable, was to authorize recovery of any realized profit by directors, officers and certain large stockholders who engaged in short-swing transactions (six months or less) of sale and purchase or purchase and sale. The intent as to such short-swing transactions was to stop the *possible,* not the actual—for that was considered to be too difficult to prove—use of inside information.[15] It is clear that Section 16(b) applies to every more than 10 percentum beneficial owner without regard to his factual access to or possession of inside information. The statute speaks only of more than 10 percentum beneficial owners and not of "insiders". It does not require inside knowledge or bad motive. It is also

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[15] Actual culpability is not required of the narrow class of persons to which Section 16(b) applies. As said by Judge Learned Hand in *Gratz v. Claughton,* 187 F.2d 46, 49-50 (2nd Cir. 1951), cert. den. 341 U.S. 920 (1951): "The section does indeed cover trading by those who in fact have no such information, ... If only those persons were liable, who could be proved to have a bargaining advantage, the execution of the statute would be so encumbered as to defeat its whole purpose." See, also, *Western Auto Supply Co. v. Gamble-Skogmo, Inc., supra* at 743, "We cannot have one rule for insiders with good intentions and another for those who would flagrantly abuse their trust. The burden of the Act must fall on all violations with equal weight." Thus, Section 16(b) is viewed as not penal requiring intent to misuse inside information but simply remedial to remove the right to retain profits obtained while in the advantageous position the statute describes.

sufficiently clear that Congress intended that Section 16(b) apply to only those or only to that class recognized by the 16(b) statutory language as generally having the opportunity of obtaining inside information, and that more than 10 percent security holders were deemed by Congress to be of that class.[16]

Thus, to carry out the general purpose Congress sought by enactment of the statute, having in mind that at least to some degree that language is not free of ambiguity, we have concluded that the purchase by which a security holder acquires a more than 10 percentum status is included as a part of a pair of transactions of purchase and sale occurring within six months of each other within the meaning of Section 16(b). Any other view has the weakness of impracticability of application of the statute, a result we should not lightly attribute to a Congress striving to prevent what it considered to be highly undesirable speculations by certain security owners who are in position to obtain or to be exposed to that kind of inside information lending itself to speculative use to the possible detriment of the public.

Illustrative of some of the mischief that would be permitted in spite of Congress' action in enacting 16(b) if we accorded with Emerson's contentions is an initial purchase of as large a block of stock as 51 percent or more of a corporation's stock, followed by a sale any time

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[16] "The corporation is thus provided with a method of recoupment from insiders profits realized either through purchases of an equity security followed by its sale at a higher price; or from sale of an equity followed by a purchase at a lower price within the six month period. Once the statutory conditions have been fulfilled, it is irrelevant that the insider either did not make unfair use of inside information or that he might not have intended, at the time he purchased the security, to sell it within six months." Painter, Federal Regulations of Inside Trading, Chpt. III, pp. 24-25 (1968).

within six months by the stockholder who obviously within that period could obtain much inside information and also could influence, manipulate or control corporate transactions. The deterrence of such apparent potential mischief must have been within the contemplation of Congress.[17]

Nor does the fact that Emerson acquired its stock in an effort to merge with Dodge and sold it after such merger appeared no longer possible exempt Emerson from the ambit of Section 16(b). An insider engaged in a contest for control of its stock issuer may have substantial opportunity for short-term profits perforce of its substantial stock ownership. In less than three months from its stock purchase Emerson apparently had made substantial short term profits related to its stock acquisition activities in its effort to gain stock control of Dodge.[18]

We reach the last question of the present appeal; namely, whether Emerson's sale of 115,282 shares of stock on September 13, 1967, within six months of its acquisition of 13.2 percent of Dodge's stock, but at a time when Emerson had reduced its stock holdings to below 10 percent of Dodge's stock, is a transaction where the beneficial owner was a more than 10 percent beneficial

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[17] One notorious example before Congress concerned brothers who within a short time before company passed a dividend sold their stock for $16,000,000 and after the dividend became public repurchased an equivalent amount for $7,000,000. See: S. Rep. No. 792, 73rd Cong., 2nd Sess. 9 (1934).

[18] See: Note, Insider Trading: The Issuer's Disposition of an alleged 16(b) Violation, 1968 Duke L.J. 94, 97. "Section 16(b) often imposes liability on the 'innocent' insider who has not abused his position since the unfair use of confidential information by insiders or the intent to profit by its use is irrelevant to the question of liability under section 16(b)." *Petteys v. Butler*, 367 F.2d 528 (8th Cir. 1966), cert. den. 384 U.S. 1006 (1967); *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2 Cir. 1943), cert. den. 320 U.S. 751 (1943).

owner both at the time of the purchase and sale within the intendment of Section 16(b). The District Court found that while Emerson was the beneficial owner of 13.2 percent of Dodge shares it determined to dispose of its entire stock holdings pursuant to a plan whereby it hoped to avoid, to the extent possible, Section 16(b) liability for short term profits. Pursuant to that determination it made the mentioned two separate sales not tied in any legal way to each other.

Insofar as we are advised the question presented by the second sale is one of first impression. Our review of the record indicates the District Court's finding as a fact that Emerson made two separate sales not legally tied together in any way, with the described intent to avoid losing its profit on its second sale because of possible Section 16(b) applicability, is not clearly erroneous, and is supported by substantial evidence. The factual question as to whether a particular sale is a separate and independent sale is a matter for decision under the peculiar facts of the particular case. In this regard each case must stand or fall on its own facts.

However, there is no reason why a person may not conduct his business in such a way as to intentionally minimize or eliminate his loss of profits under Section 16(b) by any means permitted by law. Such conduct is to some extent analogous to tax avoidance conduct which is permissible.[19] We, therefore, do not fault Emerson for its

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[19] See *Helvering v. Gregory*, 69 F.2d 809, 810 (2nd Cir. 1934): ". . . A transaction, otherwise within the exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. One may so arrange his affairs that his taxes shall be as low as possible . . . ." On appeal, the Supreme Court affirmed saying: "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory v. Helvering*, 293 U.S. 465, 469 (1934).

effort to avoid the total loss of profits on its 152,282 shares of stock by first reducing its holdings by means of a bona fide sale to below 10 percent, and then in a later, independent bona fide sale while owning less than 10 percent, dispose of its remaining shares.

Concededly, Congress through Section 16(b) did not endeavor to deny profits resulting from all insider transactions. Stock held one day more than six months before being sold escaped Section 16(b) regulation entirely. Stock amounting to a bare fraction less than the "more than 10 percentum" likewise escaped Section 16(b) entirely. The standards set forth in Sections 16(a) and 16(b) are arbitrary both in the selection of time, 6 months, and the selection of amount, more than 10 percentum. A security transaction either falls within or without the scope of Section 16(b) depending on whether these arbitrary standards are met.[20] A security holder such as Emerson does suffer some detriment albeit small in its two short-swing transactions in that it does lose its profit acquired from its first sale, made while it was a more than 10 percentum security holder. After that sale the arbitrary standards enacted by Congress in 16(b) of a "more than 10 percentum" security holder are no longer met, and subsequent sales appear to be free of Section 16(b) regulation. Such subsequent sales literally fall within the exemption language of 16(b): "[T]his subsection shall not be construed to cover any transaction where such bene-

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[20] Some scholars note a recent trend to be more realistic and less formalistic in applying 16(b), especially in defining what is a sale, a purchase, and a transaction within the ambit of the Act. See, Lowenfels, Section 16(b): A New Trend In Regulating Insider Trading, 54 Corn. L. Rev. 45 (1968); *Petteys v. Butler*, 367 F.2d 528 (8th Cir. 1966), cert. den. 385 U.S. 1006 (1969); *Blau v. Lamb*, 363 F.2d 507 (2nd Cir. 1966), cert. den. 385 U.S. 1002 (1967).

ficial owner was not such both at the time of the purchase and sale . . . ."

Since we have determined as a matter of law that intent as such to avoid loss of realized profits by engaging in two independent sales not legally tied to each other and made at different times to different buyers such as these described above, does not result in treating the two sales as one sale of the entire stock held, nor as one continuous transaction, we look to 16(b) to determine whether the second sale was a sale otherwise proscribed by that section. While we agree that Section 16(b) is to be broadly and liberally construed to achieve the intent of Congress, we are unable to discern from any of the Congressional hearings or from the broad basic purpose of 16(b) any intent on the part of Congress not to mean what it has literally said in the 16(b) exclusion clause, giving the words used in that clause a liberal and reasonably flexible meaning. We are not free under the guise of statutory interpretation to rewrite statutes so as to include matters which for unexpressed reasons Congress did not include.[21] We believe it clear that this second and independent sale of September 13 was not made at the time Emerson was a more than 10 percentum stockholder, whether the phrase "at the time of" be viewed as meaning immediately before, simultaneously with or immediately after the 10 percentum stockholder status. Hence, Emerson is not required to pay over to Reliance any profits realized from that sale.

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[21] It is noteworthy the preamble was in none of the bills on which public hearings were held. The bill submitted to the House by the Committee on Interstate and Foreign Commerce completely omitted the future 16(b). The bill submitted by the Banking and Currency Committee to the Senate was the first to contain the preamble. See, S. Rep. 3420, 73rd Congress, 2nd Sess., 16(b) 1934; Note, Short-Swing Profits and the Ten Percent Rule, 9 Stan. L. Rev. 582, 586, N. 23 (1957).

Accordingly, we remand this cause to the District Court with directions to proceed in accordance with the views expressed herein.

IT IS SO ORDERED.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 20014. September Term, 1970.

EMERSON ELECTRIC CO.,
Appellant,

vs.

RELIANCE ELECTRIC COMPANY,
Appellee.

Appeal from the United States District Court
For the Eastern District of Missouri.

(November 12, 1970.)

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that this Cause be and it is hereby remanded to the said Distr Court with directions to proceed in accordance with the views expressed in the opinion of this Court this day filed herein.

APPENDIX C.

Opinion of the District Court.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION.

No. 68 C 87 (3).

EMERSON ELECTRIC CO.,
Plaintiff,

vs.

RELIANCE ELECTRIC COMPANY,
Defendant.

MEMORANDUM OPINION.

In this case, tried to the Court, plaintiff seeks a declaratory judgment concerning its liability, if any, to defendant for profits realized on the sale of certain stock. Defendant has counterclaimed for the amount of the profits. The issue of profits has been postponed pending the resolution of the issue of liability. We have diversity jurisdiction.

For determination is the construction and application of Section 16(b) of the Securities Exchange Act of 1934 (Section 78p(b), 15 U.S.C.) to the peculiar facts of this case. Most of the essential facts have been stipulated. On May 22, 1967, Emerson Electric Company invited tenders of up to 550,000 shares of Dodge Manufacturing Corporation common stock at a price of $63, reserving the right to purchase all shares tendered. As extended, the tender offer expired June 16, 1967. At that time,

Emerson elected to purchase all of the tendered shares, a total of 152,282. These shares constituted 13.2% of the outstanding Dodge common stock. Prior to June 16, 1967, Emerson did not own any shares of Dodge common stock.

Shortly before the stock acquisition by Emerson, Dodge and Reliance Electric & Engineering Company (now Reliance Electric Company) had entered into an agreement whereby Dodge was to be merged into Reliance. Emerson sought to prevent the merger, which needed stockholder approval, advocating instead a merger with Emerson. A stockholders' meeting to consider the merger proposal was called for August 22, 1967. A proxy fight ensued, the result of which was victory for Reliance. Shortly thereafter, but prior to the final approval of the merger by the Dodge directors, Emerson sold its Dodge holdings. It first sold 37,000 shares at $68 a share on August 28, 1967 to Goldman, Sachs & Company, investment brokers. Then, on September 11, 1967, it sold the remaining 115,282 shares at $69 to Dodge. Concededly, Emerson realized a substantial short-term profit on these sales even after deducting all of its expenses of purchase and sale.

Section 16(b) provides, inter alia, that any profit realized by the beneficial owner of more than 10% of certain equity securities from the purchase and sale (or sale and purchase) within any period of less than six months shall inure to and be recoverable by the issuer. The statute further provides:

> "This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved * * *."

The initial question for determination is whether Emerson was a beneficial owner of more than 10 per cent

of Dodge common stock "at the time of the purchase" of such stock. Emerson states the question thusly: "Should the very purchase by which one, who prior thereto owns no securities of an issuer, becomes a 10% owner be counted in determining liability for insider short-swing profits?" It argues that in the context of the Act, the words "at the time of purchase" can mean only "before the purchase" and that since Emerson owned no Dodge securities prior to June 16, 1967, and had no access of "inside" information, it may not be subjected to Section 16(b) liability. We do not agree.

Passing for the moment Emerson's further contention that its acquisition of the stock was not a "purchase" within the meaning of the Act, we are convinced that "at the *time* of purchase" includes the time "simultaneously with" the purchase, so that a shareholder becomes subject to the provisions of Section 16(b) immediately upon (that is, at the very moment of) his acquisition of more than 10 per cent of the corporation's stock. This construction accords not only with the literal meaning of the language, but more importantly, best serves to effectuate the legislative purpose manifest in Section 16(b). Accord: *Stella v. Graham-Paige Motors Corporation*, D.C.N.Y., 104 F. Supp. 957, affirmed (on this point) 2 Cir., 232 F.2d 299, cert. den. 352 U.S. 831. See Cook & Feldman, Insider Trading Under the Securities Exchange Act, 66 Harvard Law Review 612, 631-632.

Emerson urges, however, that although the transaction by which it acquired more than 10 per cent of Dodge stock was in fact a "purchase" (and indeed, under any view, a cash acquisition of this nature, could not be otherwise) nevertheless it was not a "purchase" of the kind contemplated by Section 16(b). Its theory is that each case must be examined on its own peculiar facts

(*Petteys v. Butler*, 8 Cir., 367 F.2d 538), and that since the only evidence of record is to the effect that Emerson had no access to and had not acquired "insider" information prior to the purchase, its acquisition of a 13.2 per cent interest was not one that could have lent itself to the practices Section 16(b) was enacted to prevent. Again, we do not agree.

We do not believe that Congress intended to exclude any transaction which is undeniably a purchase under any concept thereof. In the cases in which the facts were examined by the courts, the issue was whether a particular transaction which did not involve a purchase (or a sale) within the ordinary understanding of those terms, e.g. conversions and reclassifications of stock, was a purchase (or a sale) as defined by Section 3 of the Act. It was to aid in resolving problems of that nature that the courts have created the following test or standard: "Every transaction which can *reasonably be defined as a purchase* will be so defined, if the transaction is of the kind which can possibly lend itself to the speculation encompassed in Section 16(b)" *Ferraiola v. Newman*, 6 Cir., 259 F.2d 342, 345. This is the test applied by the Eighth Circuit. *Petteys v. Butler*, 8 Cir., 367 F.2d 568.

Petteys involved a conversion transaction and the Court held that under the "unique facts" of that case the conversion of convertible preferred stock to common stock by non-controlling directors was not a purchase within the purview of the Act even though it might "represent a type of exchange of equivalents that can be read into a literal interpretation of the § 16(b) language of 'otherwise acquire' and 'otherwise dispose of' ". What *Petteys* ruled is succinctly summarized by Judge Gibson as follows (367 F.2d, l. c. 356): "If no purpose is served by attaching the *artificial label* of 'purchase' to a transaction, when it has

none of the common indicia of a purchase, no such label is demanded, nor will one be attached. This, we believe to be the correct law and it is the law to be applied by us to the facts of this case."

In the instant case, no artificial label of "purchase" is attempted. The transaction by which Emerson acquired the Dodge stock has all the "common indicia" of a purchase. Here, we do not have an "otherwise acquire" situation, but rather, a simple, conventional acquisition of stock for cash.

We hold that the transaction was a purchase under any view of the facts. By such purchase, Emerson "elected to become a statutory fiduciary", thereby becoming subject "to the disciplinary purpose of § 16(b)", *Western Auto Supply Company v. Gamble-Skogmo, Inc.*, 8 Cir., 348 F.2d 736, regardless of the actual availability or use of inside information. The possibility of insider abuse is inherent in every such transaction. The expressed purpose of the statute is to prevent the unfair use of information which *may* have been obtained by the beneficial owner. Clearly, Section 16(b) is applicable to Emerson's August 28, 1967 sale for cash of 37,000 shares of Dodge stock.

The basis on which Emerson disclaims liability as to said sale is that it was "forced" to dispose of these shares because of the foregone conclusion that the Dodge-Reliance merger would be approved very shortly with the result that the consummation of the merger would, so it is claimed, be treated as a sale of the Emerson-held Dodge shares in exchange for shares of Reliance. We are not convinced that the exchange of shares incidental to the merger would necessarily involve a "sale" of the Dodge stock held by Emerson. The cases cited by Emerson on this point go no further than to hold that for purposes of

the *anti-fraud* provisions of the Act, the acquisition of new stock for the old, resulting from a statutory merger, is deemed a purchase and sale. *Dasho v. Susquehanna Company*, 7 Cir., 380 F.2d 262. And see *SEC v. National Securities, Inc.*, 393 U.S. 453. Thus, in the *SEC* case, the Supreme Court noted that the meaning of particular phrases in statutes must be determined in context and that the same words may take on a different coloration in different sections of the securities laws. The Court stated, "We must therefore address ourselves to the meaning of the words 'purchase or sale' in the context of §.10(b). Whatever these or similar words may mean in the numerous other contexts in which they appear in the securities laws, only this one narrow question is presented here." And again, "Whatever the terms 'purchase' and 'sale' may mean in *other* contexts, here an alleged deception has affected individual shareholders' decisions in a way not unlike that involved in a typical cash sale or share exchange. The broad anti-fraud purposes of the statute and the rule would clearly be furthered by their application to *this* type of situation."

Hence, it is not at all certain that in the context of Section 16(b) the word "sale" would be construed to include the involuntary exchange by Emerson of the Dodge shares for those of Reliance pursuant to the merger. Inasmuch as such a transaction is an "otherwise dispose of" situation, and not a typical or conventional sale, the rationale of *Petteys, supra*, would undoubtedly require an examination of the "unique" facts of the case to determine whether the purposes of Section 16(b) would be furthered by attaching the artificial label of "sale" to this type of situation. However, we need not decide whether Emerson would have been liable for Section 16(b) profits had it held the Dodge shares until the merger was con-

summated, since it did not do so and the question is now moot.

Reduced to its essentials, what Emerson is saying is that it should be permitted to retain its short-swing profits resulting from the cash sale of the 37,000 shares of stock, because otherwise it would have been required to account to Reliance for the short-swing paper profits it would have realized upon the consummation of the merger. Yet the very purpose of Section 16(b) is to prevent the retention of such short-swing profits. Under any view of the case, Emerson is liable for Section 16(b) profits on its sale for cash of the 37,000 shares of Dodge stock.

Less obvious is the resolution of the further question: Should Emerson be held accountable for the profits realized on the September 13 sale of its remaining 115,282 shares even though at that time (by reason of its prior disposition of the 37,000 shares) Emerson was the beneficial owner of less than 10% of Dodge shares. We have concluded that under the peculiar facts of this case, Section 16(b) is applicable to the September 13 transaction.

We are convinced that while Emerson was the beneficial owner of 13.2% of Dodge shares, it determined to dispose of its entire stock holdings pursuant to a plan whereby it hoped to avoid, to the extent possible, Section 16(b) liability for short term profits. The guidelines of the plan were formulated in a letter written by its counsel to its board chairman under date of June 26, 1967. In that letter, counsel discussed alternatives to a proxy contest with Reliance, "principally *how* to dispose of, *at a profit*, the shares of Dodge stock which Emerson now owns." He took note of the "uncertainty" whether the very purchase whereby Emerson became the holder of more than 10% of the Dodge stock should be taken into account for Section 16(b) purposes and advised that "Emerson should

proceed on the assumption that 16(b) does apply and *should seek to avoid its consequences.*" It was counsel's opinion that if a merger occurred, Emerson would be considered to have "sold" its Dodge shares for Section 16(b) purposes. On that premise, he outlined "*defensive* action against 16(b) possibilities" which in his opinion should be taken by Emerson: "The *initial* defensive step * * * is for Emerson to reduce its holdings of Dodge stock to less than 10%. This means the gift or sale * * * of 37,100 shares of Dodge stock owned by Emerson. From this point on, Emerson, no longer being a 10% stockowner of Dodge can sell the balance of its Dodge stock free of any 16(b) risks; provided, of course, the second sale is not *legally tied* in any way to the first sale."

Because of the manner in which this case was submitted, the facts were not fully developed, as they might have been through vigorous cross-examination. However, the actions of Emerson when viewed in the light of its counsel's letter, clearly bespeak the fact that although the two sales of Dodge stock were technically separate transactions and the second sale was not "legally" tied in any way to the first sale, the two sales were effected pursuant to a single pre-determined plan of disposition with the overall intent and purpose of avoiding Section 16(b) liability. Emerson's initial sale of 37,000 shares[1] was motivated solely by its desire to reduce its holding to just under 10% immediately prior to disposing of the balance of its shares in an attempt to escape Section 16(b) liability on the short-swing profits it contemplated would be made upon such remaining shares. Significantly, the negotia-

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[1] An increase in the number of Dodge outstanding shares made it necessary to sell only 37,000 instead of 37,100 shares as suggested in counsel's letter in order to reduce Emerson's holdings to less than 10%

tions with Reliance commenced just one day after Emerson agreed by telephone conversation to sell the initial 37,000 shares to Goldman, Sachs & Company, and the agreement for the sale was tentatively arrived at one week thereafter subject only to the formalizing of the understanding. The timing was not a happenstance. That the negotiations with Reliance for the sale of the Emerson-held Dodge shares were initiated by Reliance does not affect our conclusion that the two sales were in fact interrelated parts of a single plan. In fact, in his June 26 letter, Emerson's counsel had anticipated the possibility of a settlement under a negotiated agreement providing for the purchase of the Dodge shares owned by Emerson, the settlement to provide for a sale by Emerson of at least 37,100 of its Dodge shares before the merger was approved by the stockholders.

Looking through form to discern substance, we hold that in truth and in fact the two sale transactions were related parts of a single plan devised by Emerson to dispose of all its Dodge stock in an attempt to "avoid the consequences" of Section 16(b). Emerson may not thus insulate from Section 16(b) liability the short-term profits derived from its disposition of the Dodge stock. To sanction this two-step sale procedure would be to subvert the purposes of Section 16(b) and to produce a result plainly at variance with its manifest policy. Unless appearances are to control, rather than reality, we believe that for purposes of this case the "time of sale" should include the entire period during which a series of related transactions take place pursuant to a plan by which a 10% beneficial owner disposes of his stock holdings.

We do not question the good faith of Emerson or its counsel. What we do question is its right to excise 16(b) liability or "avoid its consequences" by utilizing a series

of related transactions, some of which considered separately might be exempt, when the obvious substance of the transaction as to a whole is the disposition of its more than 10% beneficial interest.

We hold that Emerson is liable to Reliance, as the successor in interest to Dodge, for the net profits realized by Emerson from the sale of all its 152,282 shares of Dodge stock. Counsel for Reliance are directed to submit a form of interlocutory declaratory judgment in accordance herewith.

The foregoing memorandum constitutes our findings of fact and conclusions of law on the issue of liability.

Dated this 18th day of September, 1969.

/s/ JOHN K. REGAN,
United States District Judge.

APPENDIX D.

Judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION.

No. 68 C 87 (3)

EMERSON ELECTRIC CO.,
Plaintiff,

vs.

RELIANCE ELECTRIC COMPANY,
Defendant.

INTERLOCUTORY DECLARATORY JUDGMENT.

This cause came on to be heard by the Court on the pleadings, the evidence presented at trial, and the written stipulation and briefs of counsel for the parties, and the Court, being fully advised in the premises, finds the facts and law to be as set forth in its memorandum opinion dated September 18, 1969 and, accordingly, it is

ORDERED, ADJUDGED AND DECREED:

1. That plaintiff Emerson Electric Co. is liable to defendant Reliance Electric Company for the net profits realized by plaintiff from the sales of 152,282 shares of stock of Dodge Manufacturing Company on August 28 and September 13, 1967.

The Court is of the opinion and therefore finds that this order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order under Title 28

U.S.C.A. § 1292(b) may materially advance the ultimate termination of this litigation.

IT IS HEREBY FURTHER ORDERED that this matter be certified under Title 28 U.S.C.A. § 1292(b) and that all proceedings in this cause be stayed pending the final action of the United States Court of Appeals for the Eighth Circuit.

Dated this 9th day of October, 1969.

/s/ JOHN K. REGAN,
United States District Judge.